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No. 88-1306

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

ERIC KRIVANEK,

Petitioner,

v.

MAD RIVER VALLEY HEALTH CENTER, INC.,

Respondent.

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Facts	2
Claims of the Parties	3
Expert Testimony	4
Petitioner's Statement of the Case	6
Cross-examination of Petitioner's Expert	8
Post-Judgment Motion	9
Appeal to the United States Court of Appeals for the Second Circuit	10
SUMMARY OF ARGUMENT	10
ARGUMENT	11
I. THE PETITION RAISES NO SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI. NO QUESTION OF LAW IS INVOLVED, BUT MERELY ROUTINE APPELATE REVIEW BY THE COURT OF APPEALS OF A DETAILED RECORD	11
II. THIS CASE DOES NOT PRESENT A CONFLICT AMONG THE COURTS OF APPEALS IN A PROPER FORM OR AT AN APPROPRIATE TIME FOR THIS COURT'S REVIEW	12
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Bauer v. Raymark Industries, Inc., 849 F.2d 790 (2d Cir. 1988) 13

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1932) 12, 15

Green v. American Airlines, Inc., 804 F.2d 453 (8th Cir. 1986) 14

Newmont Mines, Ltd. v. Hanover Insurance Co., 784 F.2d 127 (2d Cir. 1986) 13

Portman v. American Home Products Corp., 201 F.2d 847 (2d Cir. 1953) 12

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 12

Urti v. Transport Commercial Corp., 479 F.2d 766 (5th Cir. 1973) 13

CONSTITUTIONS

U.S. Const. amend. VII 1, 14-15

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 1

RULES

Sup.Ct.R. 17.1. ..... 11, 12

OTHER AUTHORITIES

11 C. Wright & A. Miller, Federal Practice & Procedure, § 2819 (1973) 13, 14

11 C. Wright, A. Miller & F. Elliott, Federal Practice & Procedure, § 2819 (Supp. 1988) 13

JURISDICTION

This action was originally commenced by the Petitioner in the United States District Court for the District of Vermont. Jurisdiction there was founded on diversity of citizenship, 28 U.S.C. § 1332. Judgment was entered on a jury verdict in favor of Respondent. Petitioner's Motion for Judgment Notwitstanding the Verdict or for New Trial was denied, and Petitioner timely appealed to the Second Circuit Court of Appeals. The Second Circuit affirmed the judgment of the district court by summary order entered October 13, 1988. Petitioner's Petition for Rehearing was denied by order entered December 12, 1988. This order issued as mandate December 28, 1988.

On February 4, 1989, Petitioner filed his Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The jurisdiction of this Court to review cases in the courts of appeals by writ of certiorari is granted by 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

U.S. Const. amend. VII.

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STATEMENT OF THE CASE

This is an action claiming medical malpractice. After ten days of trial, the jury returned a verdict for the Respondent Health Center. The Court, the Honorable Franklin S. Billings, Jr., ruled the verdict was not against the weight of the evidence and denied Petitioner's Post-Judgment Motion. (Petition at 10A.) The Judgment was affirmed by the United States Court of Appeals for the Second Circuit. Petitioner seeks review by Writ of Certiorari. The issue presented is whether the court of appeals had authority to review the denial of the Motion for New Trial and whether it correctly decided the motion was without merit.

Petitioner's Statement of the Case makes several assertions which are misleading or unsupported by the record. Respondent will therefore restate the case as well as point out some of the material errors in Petitioner's Statement. This detail is included because of the request that this Court review the weight of the evidence.

Facts

Respondent Mad River Valley Health Center, Inc. is a family health clinic in the Town of Warren, Vermont. Warren is a rural community in north central Vermont; the Health Center serves a population of approximately 2,500 to 3,000. (IV Tr. 3-4.) On Monday, January 27, 1986, Timothy J. Wargo, M.D. was one of two physicians practicing at the Center. (I Tr. 5.) Dr. Wargo is a Board Certified Family Practitioner. (I Tr. 3.) The Health Center also employed a nurse (Lorraine Wargo, R.N., Dr. Wargo's wife), a medical assistant and an office manager. (I Tr. 5-6.)

On January 27, 1986, at approximately four o'clock in the afternoon, the Petitioner came to the Health Center complaining of headache, vomiting and back pain. (VIII Tr. 5, 11; Ex. M.) Dr. Wargo interviewed Petitioner and conducted a physical exam. He thoroughly checked Petitioner's neck several times (I Tr. 48), including two specific tests for meningismus or nuchal rigidity. (I Tr. 15, 25; IV Tr. 2; V Tr. 2-5.) He found the neck to be supple with some muscle spasm, and the patient to be alert and cooperative. (I Tr. 68; Ex. M.) Dr. Wargo concluded Petitioner had the flu; he gave him some Tylenol and told him to come back if things did not change for the better. (I Tr. 49, 61; Ex. M.)

Petitioner did not return until 42 hours later on Wednesday, January 29, 1986, at approximately 10 o'clock in the morning. Dr. Wargo found a dramatic change in his condition; Petitioner was very confused, dehydrated and weak. (I Tr. 75.) It was obvious this was a medical emergency and Petitioner would need immediate hospitalization. (X Tr. 32-33.) After a full examination, Dr. Wargo transferred Petitioner by ambulance to the Medical Center Hospital of Vermont in Burlington. (I Tr. 84-85; Ex. M.) At Burlington, Petitioner was diagnosed as having meningitis.

Claims of the Parties

Petitioner claims the course of his illness would have been less severe if it had been diagnosed and treated as meningitis earlier. Petitioner claims Dr. Wargo and the Health Center were negligent in failing to properly diagnose, treat and supervise Petitioner during the onset of his illness. (Petitioner's Request for Jury Instructions, ¶ 1.)

Respondent Health Center denied any negligence and offered expert testimony that Dr. Wargo acted as a reasonably skillful, careful and prudent physician in diagnosing and treating Petitioner for influenza on Monday, January 27, 1986.

Expert Testimony

In its early stages, meningitis cannot be distinguished from any other illness. (II Tr. 58, 66.) The critical clinical signs are confusion and a form of neck stiffness known as nuchal rigidity. (I Tr. 15.) There are specific ways to test for nuchal rigidity known as Brudzinski's test and Kernig's test. (I Tr. 15, 25-26.) Most people with obvious meningitis have board-like stiffness of the neck: "You put your hands on their head and when they're lying on their back, and if you're strong enough to lift them up, their entire bodies from the hips up, off the table." (II Tr. 49-50.) Nuchal rigidity is distinct from stiffness of the neck caused by muscle spasms. (I Tr. 24, 26-27.) There are no degrees or grades of nuchal rigidity; it is either present or not present. (I Tr. 33.)

When nuchal rigidity and/or confusion are present along with nonspecific signs in common with other illnesses, a diagnostic test known as lumbar puncture (spinal tap) is indicated. (II Tr. 14.) The diagnosis of meningitis cannot be made without a spinal tap. (I Tr. 23.) There are detriments and risks associated with the lumbar puncture, including a small risk of serious complications or death, which suggest caution in its use. (XII Tr. 12-13.)

Dr. Robert C. Orr was qualified as an expert witness for the Respondent Health Center. Dr. Orr is a Board Certified Family Practitioner who has practiced in Brattleboro, Vermont, for 16½ years. (XII Tr. 2-4.) In his opin-

ion, Dr. Wargo did not deviate from the standards of family practice in Vermont in his treatment of Petitioner on January 27, 1986. Dr. Wargo's evaluation and the documentation were adequate; his assessment was reasonable, and his plan was appropriate. A spinal tap was not indicated because there was nothing to make one suspicious of meningitis, *i.e.*, no stiff neck, confusion or seizures. (XII Tr. 7-8.) Before considering doing a spinal tap, one would have to have had absolute rigidity or confusion or seizures. (XII Tr. 18, 21.)

Dr. Orr was also of the opinion that Dr. Wargo did not deviate from the standards of family practice in Vermont on January 29, 1986. There is good documentation of the major change in the patient's condition, a thorough evaluation, and plans for expeditious transfer of the patient to a medical facility that could care for Petitioner's problem. (XII Tr. 11.)

Donald N. MacKay, M.D. was also qualified as an expert witness for the Respondent Health Center. Dr. MacKay is an Associate Professor of Clinical Medicine at the Dartmouth Medical School, specializing in infectious diseases. (II Tr. 6-7.) Dr. Wargo's examination of Petitioner on January 27, 1986 was proper. (II Tr. 13.) A spinal tap was not indicated. (II Tr. 13-14.)

> "The two things that we, as doctors, do observe as suspect and do a spinal tap or have one done where it could be is if a person has a stiff neck or has some signs of disfunction in the central nervous system such as confusion, stupor or in its most extreme, coma. And none of those are present. He's described as being alert, cooperative, neurologically intact, has a supple neck. In other words, the neck was not stiff."
>
> (II Tr. 14.)

The medication Dr. Wargo prescribed was proper. (II Tr. 15.) The advice Dr. Wargo gave Petitioner, "[return to clinic] if not better," was proper medical advice. (II Tr. 16-17.) The diagnosis of flu was certainly a reasonable one. (II Tr. 18.)

Dr. MacKay testified that if Dr. Wargo missed the diagnosis of meningitis on Monday, "so would have everyone else. . . . [H]e had no reason to make the diagnosis on Monday." (II Tr. 95.)

Based on Petitioner's condition on Wednesday, January 29th, Dr. MacKay believed physicians would differ in their opinion on whether to perform a spinal tap. Petitioner's symptoms could have been due to a brain abscess with intercranial pressure, and a lumbar puncture could cause death. (II Tr. 21-22.) Dr. Wargo's office was not equipped to do a spinal tap. He did the appropriate thing by sending Petitioner to a place where a spinal tap could be performed and monitored afterwards. (II Tr. 22.)

Dr. MacKay concluded that Dr. Wargo's treatment did not deviate in any way from the normal and acceptable standards applicable to a family practitioner in the State of Vermont. (II Tr. 20-21, 23-24.)

Petitioner's Statement of the Case

Throughout the Petition, it is stated that Dr. Wargo "suspected" Petitioner had meningitis. This is only partly true. Dr. Wargo had no reason to believe Petitioner had meningitis on Monday, January 27. He suspected it only in the sense that a competent physician, presented with a patient with Petitioner's symptoms, takes steps to rule out the possibility of meningitis. (I Tr. 49-

51; II Tr. 57-58, 60-61.) Dr. Wargo's examination, including the Brudzinski and Kernig tests, ruled out meningitis on Monday. (I Tr. 51; IV Tr. 2; V Tr. 2-5.)

Petitioner also claims Dr. Wargo "admitted" that he "mistakenly" believed there had to be board-like stiffness to diagnose meningitis. (*E.g.* Petition at 19.) There is no basis for this assertion that Dr. Wargo admitted a mistake. To the contrary, Dr. Wargo testified that the stiffness required to diagnose meningitis is distinct from muscle spasm. (I Tr. 24.) If there is any degree of stiffness, meaning nuchal rigidity, then meningitis should be suspected:

> "Q . . . [H]ow much stiffness has to be present to make you suspect that you've got meningitis as opposed to just your regular old garden variety stiff neck?
>
> A Okay. Again, I have to be very clear on what you mean by stiffness. . . .
>
> Q Enough to make you concerned about meningitis as a physician.
>
> A Okay. If it's just muscle spasm, doesn't make it. If there's any degree of stiffness, meaning nuchal rigidity, then I suspect the diagnosis."
>
> (I Tr. 24.)

Petitioner has not referred to any testimony in the record to support the proposition that muscle spasm is a sign of "developing nuchal rigidity," much less any testimony that Dr. Wargo admitted this "fact."

Dr. Wargo testified specifically that Petitioner probably did *not* have meningitis on Monday, January 27, 1986. (I Tr. 92.) The Health Center's experts supported Dr. Wargo's view that muscle spasm is distinct from nuchal rigidity. Dr. MacKay did not agree, even in retrospect,

that the muscle spasms on Monday were the start of rigidity on Wednesday. (II Tr. 92-93.)

Petitioner's Statement of the Case, unlike his presentation in the Court of Appeals, focuses on an alleged failure to communicate with Petitioner's school. But when Petitioner urged at the trial level that the charge should have specified "about the failure of the physician at the clinic to communicate with the school," the trial judge stated that he had used the word "monitor" in the charge, and that anything more specific would be improper comment on the facts. (V Tr. 49.)

The Petition also asserts erroneously that it was the unanimous opinion of the experts that Petitioner's parents or the school should have been notified of his condition. On January 27, 1986, Petitioner was nearly 18 years of age. Dr. Wargo had ruled out meningitis and believed he had the flu. As noted above, Dr. MacKay specifically testified that the advice given Petitioner, "[return to clinic] if not better," was proper medical advice. (II Tr. 16-17.) Supervision would have been required only "if he were a lot sicker than" he appeared on January 27. (II Tr. 84.)

Cross-examination of Petitioner's Expert

Petitioner's expert testified that he would have done a lumbar puncture in this case, even without a positive Kernig or Brudzinski test and without signs of confusion, based solely on the symptoms of fever, intense headache, back pain and vomiting. (III Tr. 41, 47.) He bolstered this opinion by references to alleged practices at the Medical Center Hospital of Vermont:

> "I can't emphasize enough how important we feel it is to establish the diagnosis as rapidly as possible in these types of situations. We now stress in our emergency room that when meningitis is suspected, an L.P. [be] done immediately. And hopefully within 30 minutes of that patient is receiving antibiotics."
>
> (III Tr. 57.)

On cross-examination, Respondent sought to test this opinion and show the true difficulty of diagnosis by reference to a case in which a lumbar puncture was not performed on a student who came to the expert's emergency room complaining of headache, and who later died of meningitis. (III Tr. 92.) When Petitioner objected to this offer to show that "even in the best of medical institutions . . . they can miss the diagnosis," the court ruled: "This is good cross-examination. We'll allow it." (III Tr. 91.)

Post-Judgment Motion

On March 17, 1988, District Judge Billings denied Petitioner's Post-Judgment Motion, stating:

> "Based on the evidence presented at trial and controlling case law, the court finds a genuine issue of fact existed regarding defendant's negligence. The jury was properly charged on the question of negligence and the verdict was not against the weight of the evidence. The court finds that defendant's counsel's examination of plaintiff's expert witness, regarding his knowledge of meningitis cases at the Medical Center Hospital of Vermont, was properly allowed and that reference to this testimony and defendant's counsel's closing argument was neither misconduct nor prejudicial. . . ."
>
> (Petition at 10A.)

Appeal to the United States Court of Appeals for the Second Circuit

On appeal to the United States Court of Appeals for the Second Circuit, Judges Lumbard, Newman and Kearse reviewed the sufficiency of the evidence to support the verdict, claimed errors in the charge, and other alleged trial errors. In a summary order, the court found the evidence was conflicting as to whether Dr. Wargo's failure to diagnose meningitis fell below the standard of due care. The court ruled that Judge Billings properly left this issue to the jury and did not err in refusing to set aside the jury's verdict. (Petition at 2A.) The court held the charge, read as a whole, was proper, and that Petitioner's specific claims of error regarding the charge were not properly preserved for review. (*Id.*) The Court found no error in the cross-examination of Petitioner's expert. (*Id.*) Finally, the court ruled that the denial of the motion for new trial was not reviewable; and in any event, that the motion was without merit:

> "The contention that the verdict was against the weight of the evidence is not available for review in this Court . . . and in any event is without merit."
>
> (Petition at 2A; citations omitted.)

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SUMMARY OF ARGUMENT

This Court should not grant certiorari merely for the purpose of examining a detailed factual record to determine whether Petitioner has received proper appellate review.

The jurisprudence in the lower courts concerning the reviewability of motions for new trial is not fully developed. The statement of the court below that such motions are unreviewable is consistent with the precedent of this Court. Any conflict among the circuits is more apparent than real, and it is premature for this Court to reexamine the question.

In any event, this case does not squarely present the legal question. The court of appeals ruled on the facts that Petitioner's motion for new trial was without merit.

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ARGUMENT

I. THE PETITION RAISES NO SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI. NO QUESTION OF LAW IS INVOLVED, BUT MERELY ROUTINE APPELLATE REVIEW BY THE COURT OF APPEALS OF A DETAILED RECORD.

A review on writ of certiorari will be granted only when there are "special and important reasons therefor." Sup.Ct.R. 17.1. The decision below represents the routine appellate work of the court of appeals. No important question of law is involved. The court of appeals reviewed an extensive record to determine whether the evidence supported the verdict, whether the charge as a whole was adequate, whether a new trial should have been granted, and whether any other alleged trial error affected the substantial rights of the parties. (See Summary Order; Petition at 1A-3A.) Resolution of these questions is important only to the litigants themselves, and no others. Petitioner is seeking merely a second level of appellate

review. But this is not and cannot be the current function of the writ of certiorari. Petitioner has advanced no "special or important" reason for this Court to become embroiled in the detailed facts of this complex medical malpractice case.

II. THIS CASE DOES NOT PRESENT A CONFLICT AMONG THE COURTS OF APPEALS IN A PROPER FORM OR AT AN APPROPRIATE TIME FOR THIS COURT'S REVIEW.

The only matter raised in the Petition which colorably would warrant this Court's consideration is Petitioner's assertion that the Second Circuit Court of Appeals' refusal to review the denial of the motion for new trial is in conflict with the decisions of other federal courts of appeals. (Petition at 21-22.) Sup. Ct. R. 17.1.(a).

In 1940 this Court stated categorically: "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940). *See also Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1932) ("The rule precludes likewise a review of such action by a circuit court of appeals.").

Judge Learned Hand elaborated for the Second Circuit Court of Appeals in 1953 that "it is too well established to justify discussion" that "there may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence." *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953). Based on this Court's controlling precedents, the Second Circuit

Court of Appeals has consistently refused to review the denial of a motion to set aside a verdict on the grounds that it is against the weight of the evidence. *E.g., Bauer v. Raymark Industries, Inc.*, 849 F.2d 790 (2d Cir. 1988); *Newmont Mines, Ltd. v. Hanover Insurance Co.*, 784 F.2d 127, 133 (2d Cir. 1986). Thus, Judge Lumbard, Newman and Kearse's Summary Order below ruled that Petitioner's "contention that the verdict was against the weight of the evidence is not available for review in this Court. . . ." (Petition at 7A.)

One leading commentator has observed that a "blizzard of dicta" have suggested that some other courts of appeals are willing to review denials of new trials sought on the ground that the verdict is against the weight of the evidence. 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2819 at 121-22 (1973). However, the conflict among circuits is more apparent than real. In 1973 Professors Wright and Miller found that actual cases of reversal of a trial judge's determination that the verdict was not against the weight of the evidence "are extremely few." 11 *Wright & Miller, supra*, § 2819 at 123 (citing a 1959 decision of the Fifth Circuit). Since initial publication of Wright and Miller's critique, only the Fifth Circuit, apparently, has persisted and on one occasion reversed the denial of a refusal to grant a new trial where the verdict was asserted to be against the weight of the evidence. *Urti v. Transport Commercial Corp.*, 479 F.2d 766, 769 (5th Cir. 1973) (test is whether there is "absolute absence of evidence to support the jury's verdict."). *See* 11 C. Wright, A. Miller & F. Elliott, *Federal Practice & Procedure*, § 2819 n60 (Supp. 1988).

None of the authority cited by Petitioner as evidencing conflicting decisions of the circuit courts of appeals is a reversal of the denial of a motion for new trial. (Petition at 22.) Most of the cited cases involve review of the *grant* of a motion for new trial, which presents entirely different constitutional questions. 11 *Wright & Miller, supra*, § 2819 at 125-27.

As Wright and Miller point out, there are constitutional problems with appellate review of the weight of the evidence:

> "To allow appellate review of the denial of the new trial motion would mean that the verdict could be set aside solely by judges who were not present at the trial even though the trial judge has found that the verdict is not against the clear weight of the evidence. This would be a complete reversal of common law practice and is very difficult to reconcile with the Seventh Amendment.
>
> Thus the courts that have said, by repeated dicta, that there are some circumstances in which they might reverse the denial of a new trial have given legitimacy to a doctrine of doubtful constitutionality. Its utility is even more dubious.
>
> *Wright & Miller, supra*, § 2819 at 125.

Since 1973, at least one circuit which had earlier intimated in dictum that denials are reviewable has recognized the constitutional dimensions of the problem. The Eighth Circuit has requested full briefing of the constitutional issue in connection with any future requests for appellate review. *Green v. American Airlines, Inc.*, 804 F.2d 453, 454-56 (8th Cir. 1986).

In short, there is no recent or substantial authority in any court of appeals which, fully informed as to the

seventh amendment issue, has reversed the denial of a motion to set aside a verdict as against the weight of the evidence. Until and unless such authority develops, it is premature for this Court to address the issue.

Further, even if this Court is inclined to resolve a blizzard of confusting dicta among the circuits, this case is not the proper vehicle to do so. Here, the denial of the motion for new trial was affirmed not merely on the basis of its unreviewability. Judges Lumbard, Newman and Kearse also observed: "The contention that the verdict was against the weight of the evidence . . . in any event is without merit." (Petition at 7A.) This ruling in itself is unreviewable. *Fairmount Glass Works, supra,* 287 U.S. at 481. It also renders the constitutional issue moot.

In summary, the Second Circuit Court of Appeals correctly decided that it does not have the power to review the denial of a motion to set aside a jury's verdict on the ground that it is against the weight of the evidence. Until any contrary jurisprudence in other circuits develops more fully, it is premature for this Court to address the seventh amendment questions which this case does not squarely present.

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CONCLUSION

There is substantial evidence to support the jury verdict that Dr. Wargo committed no malpractice. After a ten day trial and full appellate review, this litigation should end. The case does not present any special or important legal issue appropriate for this Court's review.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be DENIED.

Respectfully submitted,

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